

**M U N I**  
**L A W**

# **Applicable law**

International Commercial Arbitration

# Applicable laws - overview

- Law governing the arbitration (*lex arbitri*)
- Law governing arbitration agreement
- Applicable procedural rules
- Law governing the substance of a dispute

# Law applicable to the substance of a dispute

- Disputes in international commercial arbitration – mostly disputes arising out of a contract
- Law applicable to the substance of a dispute = law applicable to the contract
- Contract with an international element

# What rules can be applied to the substance?

- Uniform substantive rules – international conventions – CISG as an example
- National law – substantive rules contained in a national law (e.g. in civil codes etc.)
  - Conflict-of-law rules
- Non-state rules – *lex mercatoria*
  - Usages
  - General principles of law
  - Rules created by international organisations – e.g. INCOTERMS
  - UNIDROIT Principles on International Commercial Contracts

# View of national courts in the EU

- Law applicable to a contract with an international element
- Uniform substantive rules (binding for the court)
- Conflict-of-law rules of the forum – Rome I Regulation
  - Choice of law – party autonomy -> only national law
  - Rules in the absence of choice

# Arbitration - party autonomy is primary

- Arbitration laws, arbitration rules
- Article 28 of UNCITRAL Model Law
  - *The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.*
- Article 21 of 2017 ICC Rules
  - *The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute.*

# Rules of law

- National law – most often (see e.g. ICC Statistics)
  - Law of one of the parties
  - Neutral law
- International conventions – e.g. CISG
- Non-state rules

# Arbitrators (1)

- Article 28 of UNCITRAL Model Law
  - *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*
  - *In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*
- Law = national law
- Application of conflict-of-law rules of the seat is not obligatory
- E.g. arbitrators can compare conflict-of-law rules of all relevant states



# Arbitrators (2)

- Article 21 of 2017 ICC Rules
  - *In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*
  - *The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*
- Most flexible approach
- Arbitrators need not apply national law
- Arbitrators need not apply conflict-of-law rules

# Non-legal ways

- Article 28 of UNCITRAL Model Law
  - The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- Article 21 of 2017 ICC Rules
  - The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

# Sources for presentation

- Moses, M.L. *The Principles and Practice of International Commercial Arbitration*. 3rd ed. Cambridge: Cambridge University Press, 2017. Chapter 4.
- Lew, J.D.M., Mistelis, L. A., Kröll, S.M. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, Chapters 17 - 19.
- Blackaby, N., Partasides, C., Redfern, A., Hunter, M. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, Chapter 3.